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**Domestic violence by males inside and outside the European Union. What protection exists in the Istanbul Convention for women and the case law of the ECtHR and CJEU?**

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**Abstract:** The present paper aims to investigate the topic of domestic violence by a male figure as spouse, partner, husband, etc., which is linked to crimes that put a woman in a vulnerable situation, as a victim of domestic violence within the European Union. The problem is even more difficult when the woman finds herself in an environment with a male from a country outside the EU. Migration policies have now evolved, as well as the risks for women regarding forms of violence as a cause of structural and gender inequalities. The case law of recent times both from the Court of Justice of the European Union as well as from the European Court of Human Rights is now quite rich in interpreting international instruments such as for example the Istanbul Convention and the EU which have offered greater protection towards women who suffer domestic violence. This is

therefore a topic that goes beyond the European scope and is in its infancy, very delicate and difficult given that the problem is not to distance a male from a woman but whether the violence suffered is all true and how we can truly protect a woman in such a situation.

**Keywords:** domestic violence; Istanbul Convention; EU internal market; free movement of persons; migrant victims; husband; partner extra of the Union; femicide; ECHR; ECtHR; CJEU; CEDAW; UNHCR.

## Introduction

The continuous war crises of the recent years but also the global chaos created by lack of values, economic, health and migration crises, have led to the “destruction” of families in various states, and as a result to talk of femicide, murders of women for gender reasons<sup>1</sup>, violence as a relative practice of female genital mutilation, forced marriages with foreigners, honor killings, etc. (Rudolf, Eriksson, 2007; Simonovic, 2014; Tsankov, Helm, 2014; Niemi, Peroni, Stoyanova, 2020).

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1See the European Institute for Gender Equality: [https://eige.europa.eu/publications-resources/thesaurus/terms/1192?language\\_content\\_entity=en](https://eige.europa.eu/publications-resources/thesaurus/terms/1192?language_content_entity=en). Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW) which was adopted on 18 December 1979 by the United Nations General Assembly: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>

A general demonstration against women is noted at a global level where domestic violence occurs in countries of various cultures as well as in the European context due to continuous immigration and not.

These are not cases of isolated events since the abuses continue and characterize the use of psychological and physical force, as a threat from the male side that has the aim of intimidating, tormenting and managing the woman for personal reasons and not. Thus, domestic violence has aspects of economic violence, where access to control of one's resources is denied, verifying unhealthy relationships that result in gender inequalities.

Domestic violence is taken into consideration as a private situation and recognized as a violation of human rights, that are protected at international level. We immediately recall the Council of Europe that has committed to understanding the forms of gender violence that are also independent of the circumstances verified, i.e. domestic violence that represents the manifestation of a serious type of violation against women.

We recall the old Recommendation (2002) of the Committee of Ministers on the protection of women as victims of violence adopted on 30 April 2002, which stated that:

“(...) violence against women is to be understood as any act of gender-based violence, which results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life (...) is not limited to, the following: a. violence occurring in the family or domestic unit, including, *inter alia*, physical and mental aggression,

emotional and psychological abuse, rape and sexual abuse, incest, rape between spouses, regular or occasional partners and cohabitants, crimes committed in the name of honour, female genital and sexual mutilation and other traditional practices harmful to women, such as forced marriages (...)".

In the same spirit, the European Women's Lobby (EWL) Charter of Principles on Violence Against Women was adopted in 2007 by the Council of the European Women's Lobby, as a public network that brings together women's associations from the territory of the European Union<sup>2</sup>.

For it, domestic violence is the result of an imbalance of power between men and women that is based on a precise, aligned vision of a "feminist perspective" that is presented in Art. 1 of this Charter in which violence against women is considered as a structural phenomenon having as its primary motivation gender inequality.

Equally important is Recommendation No. 35 of the CEDAW Committee<sup>3</sup> on gender-based violence against women of July 2017, which framed violence against women in the international protection of human rights, i.e. as a form of discrimination based on gender, a normative value that prohibits violence and broadens the definition of violations of rights on women's sexual

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<sup>2</sup>European Women's Lobby Charter of Principles on Violence Against Women: [www.womenlobby.org/IMG/pdf/charter\\_of\\_principles\\_on\\_vaw.pdf](http://www.womenlobby.org/IMG/pdf/charter_of_principles_on_vaw.pdf).

<sup>3</sup>See for example: UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 35 (2017) on gender-based violence against women, updating general Recommendation No. 19 (26 July 2017) UN Doc CEDAW/C/GC/35: <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no-35-2017-gender-based>; General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, 5 November 2014: <https://www.refworld.org/legal/general/cedaw/2014/en/102146>.

and reproductive life (Reddock, 2022)<sup>4</sup>.

The Convention on preventing and combating violence against women and domestic violence, called the Istanbul Convention, was adopted by the Committee of Ministers of the Council of Europe on 7 April 2011 and entered into force on 1 August 2014, ensuring an approach that integrates the actors of society as well as providing protection in cases of violence against women and support of the victims (McQuigg, 2012; Meyersfeld, 2012; Vido, 2014; Jurasz, 2015; Kanbur, 2021; De Vido, Frulli, 2023).

Art. 12, par. 1 of the Convention has asked the states parties to:

“(...) promote changes in the socio-cultural behaviour of women and men, in order to eliminate prejudices, customs, traditions and any other practices based on the idea of the inferiority of women or on stereotyped models of the roles of women and men (...)” (Stoyanova, 2020).

According to Art. 1, the Convention aims to protect the forms of violence, domestic violence that provides, prosecutes and eliminates violence of all forms of discrimination against women to a global framework of policies, measures of assistance and protection.

Art. 3 is based on violence against women highlighting the violation of human rights as a form of discrimination against women that includes acts of violence that are based on gender that causes damage, suffering of a physical, psychological,

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<sup>4</sup>UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 19: Violence against women (1992) UN Doc A/47/38: <https://www.refworld.org/legal/resolution/cedaw/1992/en/96542>

economic type, as threats to the subjects who arbitrarily deprive the freedom of public and private life, that is, an expression of domestic violence by husband, spouse, friend, partner regardless of acts that share the residence with the victim.

Domestic violence has also been included in the 2020-2025 programme of the EU by all European governments that have made efforts to combat the related issue<sup>5</sup>.

The Directive of 14 May 2024 on combating violence against women and domestic violence imposes on the countries of the Union a criminal offence for female genital mutilation, forced marriages and, online violence sharing intimate images of women<sup>6</sup>.

The recital 4 of the Directive the Istanbul Convention has ignored domestic violence within the context of migration, i.e. of family reunification.

Recital No. 35 considered that complaints by migrant women calls on states to ensure victims for third countries regardless of

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<sup>5</sup>See recital 2 of the Position of the European Parliament adopted at first reading on 23 April 2024 with a view to the adoption of a Directive (EU) of the European Parliament and of the Council on trafficking and amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (COM(2022)0732-C9-0431/2022.2022/0426(COD):

([https://www.europarl.europa.eu/doceo/document/TA-9-2024-0310\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2024-0310_EN.html)), which is affirmed that: “(...) trafficking in human beings has various root causes (...) gender-based violence, lack of quality employment opportunities or social support, humanitarian crises, statelessness and discrimination are among the main factors making persons, in particular women, children and members of marginalised groups, vulnerable to trafficking (...)”.

<sup>6</sup>Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence, in OJ EU L 2024/1385, 24 May 2024, p. 1ss.

residence status, who report cases of violence against women and domestic violence in a non-discriminatory manner. Art. 35, requires assistance to victims of discrimination who are at risk of domestic violence and recital No. 71 refers to migrant women who circulate without documents.

The topic of violence revolves around the private sphere of domestic violence and falls within the context of the violation of fundamental human rights. A reality that is reconstructed by the European Court of Human Rights (ECtHR) that fights for victims of domestic violence within the Union as well as of women who suffer violence in the European context but come from non-European countries. In this case, the risks and forms of violence are the result of structural gender inequalities including migratory paths that are regular. In other words, the structure of gender inequality is also connected with violence of migrant women (Md Said, Emmanuel Kaka, 2023).

In conclusion, the accession of the Istanbul Convention to the EU without reservations after the support of the European Parliament as well as the related jurisprudence, have systematically opened the way towards a series of international conventions relating to violence against women.

### **Article 3 and 8 ECHR concerning domestic violence**

Physical violence at home and in places where women cannot show the public what exactly happens has put the ECtHR in front of the need to protect human rights through a jurisprudence that seeks to investigate, protect, investigate acts of violence thus providing victims with protection in the private sphere (Ristic, 2020).

Many times it is the state itself that protects women who have suffered violence by respecting women's rights and the gravity of violence that violates the right to family life.

The prohibition of torture, inhuman treatment and the right and dignity of human life rights are protected by the European Convention of Human Rights.

In fact, the ECtHR has applied international instruments regarding rights and categories of individuals such as the Convention on the Elimination of Discrimination against Women (CEDAW), which takes into account the work of the CEDAW Committee and the Recommendation no. 19 which highlights gender-based violence as well as discrimination against women.

The ECtHR has tried to define domestic violence against women through the CEDAW (Nicastro, 2021)<sup>7</sup> as well as by its

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<sup>7</sup>ECtHR, sentence of 2 March 2017, case n. 41237/14, *Talpis v. Italy*, par. 129. sentence of 23 May 2017, case n. 49645/09, *Bălsan v. Romania*, par. 79.

preamble which recognizes the structural nature and the result of a historical relative inequality between women and men<sup>8</sup>. The ECtHR has obtained a fairly mature path for the cases of domestic violence that has evolved and reached conclusions according to Art. 8 of European Convention of Human Rights (ECHR) and as a consequence reconstructs cases according to Arts. 3 and 14 ECHR. Respects of private life, as a general benefit that invites each state party to the ECHR to give the greatest protection of prevention, repression for domestic violence is provided by art. 8.

Within this framework, it is worth mentioning the Bevacqua and S. v. Bulgaria case<sup>9</sup>, in which the applicants based their case on Articles 3, 8 and 14 ECHR. Through complaints the ECtHR sought to obtain under Article 8 and 3 the relevant violation (Mcquigg, 2021).

In the Valiulienė v. Lithuania (Mcquigg, 2014) case<sup>10</sup> judge Pinto de Albuquerque stated that:

“(...) the useful effect of the European Convention on Human Rights can only be achieved with a gender-sensitive interpretation and application, taking into account the de facto inequalities between men and women and the way in which these impact on the community (...) acts of domestic violence, in the intentions and objectives of their perpetrator, have an intrinsically humiliating character for the victim. Physical suffering is only one of the effects that the perpetrator intends to achieve since even a simple spit aims to diminish the dignity of the partner through a message of humiliation and degradation (...) the elements connected with this message to attract the case

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8ECtHR, sentence of 22 March 2016, case n. 646/10, M.G. v. Turkey, par. 93.

9ECtHR, sentence of 12 June 2008, case n. 71127/01, Bevacqua and S. v. Bulgaria.

10ECtHR, sentence of 26 March 2013, case n. 33234/07, Valiulienė v. Lithuania.

are within the scope of application of Art. 3ECHR. A violation of Art. 8 ECHR could not capture the reality and the true meaning of violence in the domestic context and therefore could not allow, as instead required, a gender interpretation and application of violence (...)" (Heusel, 2024)<sup>11</sup>.

Art. 3 ECHR, after the Valiulienė v. Lithuania case, is used as a basis for domestic violence in the A.E. v. Bulgaria case. The ECtHR stated:

"(...) with regard to the violation of Art. 3 ECHR, it found that the treatment suffered by the victim reached the threshold of severity necessary to apply that provision and with regard to the violation of art. 14ECHR, once it has been established that domestic violence affects women disproportionately, it is up to the ECHR Member State to describe the type of remedial measures taken to address the disadvantage and to ensure that women can benefit, on a full equal basis with men, from the human rights and freedoms guaranteed (...) women have suffered, disproportionately and for a prolonged period, situations of domestic violence, with the authorities having failed to demonstrate adequate efforts to address the issue<sup>12</sup> (...) the absence of comprehensive official statistics cannot be explained as a simple omission, given the widespread nature of the problem in the Member State concerned and the related obligation of the Member State to pay attention to the effects of domestic violence (para. 120) (...)".

The ECtHR in the A.E. v. Bulgaria case took into consideration the jurisprudence of Kurt v. Austria (Sudre, 2021; Villiger,

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11ECtHR, Valiulienė v. Lithuania of 26 March 2013, op. cit., and the dissenting opinion of judge: Pinto de Albuquerque which is affirmed ed that: "(...) il est évident que les actes de violence domestique ont un caractère intrinsèquement humiliant et rabaissant pour la victime, qui est précisément le but de leur auteur. La souffrance physique n'est que l'un des effets escomptés. Un coup, une gifle ou un crachat vise également à diminuer la dignité du partenaire et porte un message d'humiliation et de dégradation. Ce sont précisément les éléments inhérents à l'humiliation qui attirent l'applicabilité de l'article 3 de la Convention (...)".

12ECtHR, sentence of 23 May 2023, case n. 53891/20, A.E. v. Bulgaria, par. 119: which is affirmed that: "(...) reiterates that once it has been established that domestic violence affects women disproportionately, it is for the Government to show what kind of remedial measures the domestic authorities have deployed to tackle that disadvantage and to ensure that women can fully enjoy human rights and freedoms on an equal footing with men (...) the statistics provided by the applicant show, for a sustained period of time women have continued to suffer disproportionately from domestic violence and the authorities have not shown that they have engaged adequately with the problem. In such a case, it is not necessary for the applicant to show that she was individually a target of (...)".

2023; Mcquigg, 2023) case<sup>13</sup>, underlining that in cases of domestic violence the state must intervene and take into account the risk of intense episodes and the obligations to:

“(...) respond immediately to domestic violence incidents and to demonstrate special diligence in similar contexts (para. 96) (...).”

The same line of thought is followed in the Volodina v. Russia (Mcquigg, 2021) case<sup>14</sup> where the ECtHR was aware that domestic violence does not only include physical violence but also the control of psychological abuse which is within the scope of application of Art. 3 ECHR.

The Volodina case shows that Art. 8 ECHR relating to private life is not common with Art. 3 ECHR which has as its object domestic violence by the ECtHR as torture.

Thus, the ECtHR has consolidated according to the CEDAW Convention and the Istanbul Convention violence against women as a form of discrimination based on gender (Londano, 2009; Mejia Guerrero, 2012)<sup>15</sup>.

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<sup>13</sup>ECtHR, sentence of 15 June 2021, case n. 62903/15, Kurt v. Austria, par. 175 affirms that: “(...) reiterates that consecutive cycles of domestic violence, often with an increase in frequency, intensity and danger over time, are frequently observed patterns in that context (...).”

<sup>14</sup>ECtHR, sentence of 9 July 2019, case n. 41261/17, Volodina v. Russia.

<sup>15</sup>ECtHR, sentence of 9 June 2009, case n. 33401/02, Opuz v. Turkey, which is affirmed that: “(...) to establish the obligations of states towards those who have suffered, or are at risk of suffering, domestic violence (...) the nature of the violence to which Mrs Opuz and her mother were subjected, the Court took as its starting point Article 14 ECHR. However, it quickly turned to other specialist legal instruments and decisions of international legal bodies on the issue of violence against women, including CEDAW, the Belém do Pará Convention, adopted by the Organization of American States and entered into force on 5 March 1995, and the case, considered by the Inter-American Commission on Human Rights, Maria da Penha v. Brazil, 12,051, 16 April 2001 (...) it developed two meanings of the notion of discrimination in the context of domestic violence. First, violence against women, including domestic

According to art. 14ECHR violence against women is a discrimination which also includes any form which shows inability to respond adequately to the vulnerability of the victims.

In the above cases the Osman test<sup>16</sup> was applied regarding the positive obligation for the state to protect, prevent violence as a risk of a real threat that should assess the account of domestic violence. The test aimed to verify the awareness of a real and immediate risk to the life of a person who has adopted the relevant reasonable measures and their power to have risked.

In this way it is assessed and evaluated as a response to the state that respects the reprehensible acts that are committed by non-state actors and their conduct has not anticipated and avoided the exercise of the powers of the state.

This is an approach where the burden of proof shifts from the victim to the state. Also in this case the dissenting opinion of judge Pinto de Albuquerque was supported by judges Dedov and Serghides especially in par. 12 of the judgment referring to the requirement of imminence that creates the risk for the victims that slowly and belatedly prevents the positive obligation to act by the states involved<sup>17</sup>.

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violence, is itself a form of discrimination against women; Furthermore, a state's failure to protect women from domestic violence violates their right to equal protection before the law (...)".

<sup>16</sup>ECtHR, sentence of 28 October 1998, case n. 23452/94, Osman v. The United Kingdom, par. 86.

<sup>17</sup>See the dissenting opinion of judge Pinto de Albuquerque in Valiulienė case.

### **Towards the qualification of domestic violence as torture**

The ECtHR in the Volodina v. Russia case respected domestic violence under Art. 3 ECHR. Judge Pinto de Albuquerque, by the way, highlighted that the related ill-treatment exceeded and showed that any inhuman and degrading treatment can arrive and reach the threshold of torture.

Also, in the Ireland v. United Kingdom case (Sudre, 2021)<sup>18</sup>, in par. 167, the ECtHR stated that:

“(...) torture consists of “deliberate inhuman treatment” causing very serious and cruel suffering (...) in the Volodina case this threshold was reached because the applicant had been subjected to multiple and persistent instances of domestic violence (...) recalling the General Comment 2 of the UN Committee against Torture<sup>19</sup>, which states that the systematic acquiescence of

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He affirmed that: “(...) the most problematic aspect of the state’s positive obligations is the precise definition of the scope of its duty of prevention and protection. The heart of the discussion lies in the appropriateness of this standard to the specific situation of domestic violence (...) the victim, at the stage of “immediate risk”, often realistically it is too late for the state to intervene (...) a more stringent standard of measures appears necessary where states are faced with serious, recurrent and widespread problems of domestic violence (...) the standard of care in such cases should be more stringent than the classic “Osman test”, as the state’s duty should arise whenever the risk is present, even if not imminent (...) national authorities should exercise a greater degree of vigilance with regard to the particular vulnerability of victims of domestic violence was used in the case of 30 November 2010, no. 2660/03, Hajduova v. Slovaquie, par. 50, and corresponds substantially to this more rigorous criterion. If a state were aware or should have been aware of the circumstance that a part of its population, in this case women, is subjected to repeated violence and refrains from preventing the occurrence of these attacks when the members of the group are faced with a present situation, albeit with non-imminent risk, it may be held liable for omission of the resulting violations. Therefore, the configuration of a duty of prevention and protection is the consequence of a generalized context of abuse and violence known to the national authorities (...).”

18ECtHR, sentence of 13 December 1977, case n. 5310/71, Ireland v. the United Kingdom.

19UN Committee against Torture (CAT), General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2: <https://www.ohchr.org/en/documents/general-comments-and-recommendations/>

a state to violence inflicted in private life raises concerns in the light of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the report of the UN Special Rapporteur on Torture<sup>20</sup> the ECtHR stated that a “gender-sensitive lens” should counter any attempt to downplay women’s suffering by qualifying it as “ill-treatment” rather than “torture” (...) does not fall into the trap of undermining its gender-sensitive approach by failing to recognise torture when it is faced with a situation that clearly amounts to it (...)<sup>21</sup>.

Physical injuries, psychological abuse and victims of domestic violence with sufficient manner are included in Art. 3ECHR as it is also noted in the Volodina case. There the judges are based on an evolution as they have qualified domestic violence as torture and as an inhuman and degrading treatment.

Instead, in the Tunikova case the ECtHR has established that ill-treatment and non-state actors put the offence as torture which has recognized and qualified the public perception of domestic violence in circumstances that do not call into question the necessary threshold of severity that is part of Art. 3 ECHR<sup>22</sup>.

A similar interpretative path can be noted in the Valiulienė case where the ECtHR followed the path of Art. 3 ECHR, as a

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catgc2-general-comment-no-2-2007-implementation

20Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Human Rights Council Thirty-first session A/HRC/31/57 (2016), par. 8:  
[https://ap.ohchr.org/documents/dpage\\_e.aspx?si=a/hrc/31/57](https://ap.ohchr.org/documents/dpage_e.aspx?si=a/hrc/31/57)

21See the separate opinion of Judge Pinto de Albuquerque, joined by judge Dedov in par. 8, which is affirmed that: “(...) General Comment 2 of the UN Committee against Torture, the state’s systematic omission, consent or acquiescence of privately inflicted harm raises concerns under the Convention against Torture, a Convention that enjoys *jus cogens* status and is deemed as upholding principles of customary international law (...) imperative that the Court does not fall in the trap of undermining its own gender-sensitive approach through the non-recognition of torture when it is faced with a situation that clearly amounts to it (...”).

22ECtHR, sentence of 14 December 2021, case nn. 55974/16, 53118/17, 27484/18, 28011/19, Tunikova and others v. Russia, par. 77.

unilateral declaration recognizing domestic violence as torture and, Art. 3 ECHR, characterizing the victim's conduct as dangerous<sup>23</sup>. However, the relative impact seems different for the conviction that has to do with the respondent state, where domestic violence represents serious violations for human rights that are configured as a violation of a norm of *jus cogens*<sup>24</sup>. Conclusively, the ECtHR has established and guaranteed in a flexible way the topic of domestic violence. It also affirmed Art. 3 ECHR in an outlined way (Villiger, 2023)<sup>25</sup> taking into account the conditions where acts that in the past are named as inhuman and degrading treatments and not as torture can be qualified as such in the near future. Additionally, the ECtHR has considered that the standard for the scope of protection of human rights needs consequences that are inevitable to evaluate the violations of the fundamental values that are part of every democratic society (Villiger, 2023)<sup>26</sup>.

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23ECtHR, sentence of 1st June 2010, case n. 22978/05, *Gäfgen v. Allemagne*.

24ECtHR, Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture, 26 April 2022, par. 59: <https://hudoc.echr.coe.int/eng?i=003-7317048-10811277>

25ECtHR, sentence of 2 May 1997, case n. 30240/96, *D. v. The United Kingdom*, par. 49: “(...) de figure et compte tenu de l'importance fondamentale de l'article 3 (art. 3) dans le système de la Convention, la Cour doit se réserver une souplesse suffisante pour traiter de l'application de cet article (art. 3) dans les autres situations susceptibles de se présenter (...) restreindre ainsi le champ d'application de l'article 3 (art. 3) reviendrait à en atténuer le caractère absolu (...).”

26ECtHR, sentence of 28 July 1999, case n. 25803/94, *Selmouni v. France*, par. 101.

### **Domestic violence, right of residence of the spouse, non-EU partner and free movement of persons**

From what we have understood from the previous paragraphs is that the gender-based nature of domestic violence is translated as a form of violence against women, also considering gender equality.

In particular, the EU has eliminated gender inequality and is committed to fighting against all types of domestic violence<sup>27</sup>. Thus, we refer to victims of domestic violence that are connected with the discriminatory nature of violence, of the rules that make victims dependent on their migrant status as people who suffer violence (Briddick, 2020; Jakulevičienė, Biekša, 2021).

Women as victims who suffer domestic violence are disadvantaged due to the morbid attitude of an aggressor, spouse, migrant, partner from a non-EU third country where the person depends on their status<sup>28</sup>.

This means that women have a dependence on their status that denounces the violence of fear of expulsion and/or rejection

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<sup>27</sup>Gender Equality Strategy 2020-2025 of the European Commission and the Report of Gender Equality Strategy 2020-2025: [https://commission.europa.eu/document/download/965ed6c9-3983-4299-8581-046bf0735702\\_en?filename=2024%20Report%20on%20Gender%20Equality%20in%20the%20EU\\_coming%20soon.pdf](https://commission.europa.eu/document/download/965ed6c9-3983-4299-8581-046bf0735702_en?filename=2024%20Report%20on%20Gender%20Equality%20in%20the%20EU_coming%20soon.pdf) .

<sup>28</sup>This is a status that determines that the woman falls within the scope of a jurisdiction with a permanent status where the titles of partner, worker and/or spouse are conditions of access to health care and welfare benefits.

actions. Economic dependence on a violent partner, spouse certainly scares women regardless of cultural, religious and ethnic prejudices. Thus discrimination, racism in the labor market have as their objective social isolation where the lack of family, social support for language barriers presuppose a dependence for migrant women and disadvantageous consequences regarding domestic violence. This situation requires the adoption of measures to mitigate, eliminate this type of disadvantage. This is a classic example of rules that allow migrants who are victims of violence to acquire an independent migratory status.

Equally important are Art. 13, par. 2, letter c), of Directive 2004/38/EC and Art. 59, par. 1, of the Istanbul Convention which impose rules regarding domestic violence of this type and make movement within the Union necessary for the free movement of non-Union citizens as well.

Directive 2004/38/EU<sup>29</sup> allows the victim to reside in the host state together with members of his/her family as migrants. According to the Directive, a citizen of the Union exercises his/her right and can reside with his/her family members for an indefinite period. In this way, the rights that are connected to

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<sup>29</sup>Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance). OJ L 158, 30.4.2004, p. 77–123.

free movement are exercised and the right to family reunification which regulates domestic laws that have to do with immigration (Heusel, 2024).

The reasoning that is followed for the rights of citizens of non-EU countries has to do with the relative needs of the citizen of the Union who exercises rights connected to his/her citizenship. Thus, non-EU citizens place rights on relationships with citizens of the Union who host these people, sometimes hindering the exercise of their own freedoms that are also guaranteed by the same treaties (Fahey, 2009)<sup>30</sup>.

We can speak of a functional dependence where the migrant status of a non-EU citizen is part of an exercise of rights that according to the Court of Justice of the European Union (CJEU) has also taken into consideration those who come from third countries and who have the right of residence only when the spouse who is a citizen of the Union is economically active in the country of residence and until the dissolution of the marriage through divorce<sup>31</sup>.

Thus, the rights of a non-EU citizen include the end of the marriage, the departure of the citizen of the Union and the host state that subjects a citizen of the third country to the immigration law of the Member State concerned according to

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<sup>30</sup>CJEU, sentence of 25 July 2008, case C-127/08, Metock and others, ECLI:EU:C:2008:449, I-06241, par. 62.

<sup>31</sup>CJEU, sentence of 13 February 1985, case C-267/83, Diatta v. Land Berlin, ECLI:EU:C:1985:67, I-00567.

Art. 13 of Directive 2004/83. This, includes also domestic violence and allows a non-EU citizen to have the right of autonomous residence in the Member State in which he lives.

Thus, Art. 13 of the Directive for free movement arrives at a fair balance for citizens of non-EU countries who are deprived of family status as a consequence of an immediate divorce that maintains the right of residence in the host state and that satisfies certain conditions.

In particular, the family status is included in situations that develop ties with the host state and that looks at situations, ties with a non-EU citizen and with a minor that allow to remain in the host state and that maintain difficult situations including domestic violence that is called by married and/or if it is in the stage of a registered partnership.

The conditions for the maintenance of the right remain in the host state according to the objectives of the Directive on free movement that requires non-EU citizens to have the conditions that are provided for citizens of the Union.

It is also part of the right of residence, women victims of violence that bind and that demonstrate that the exercise of a subordinate and/or autonomous work activity provides for themselves and their family members the relative resources that are sufficient and that does not become a burden for the risks that are part of a family nucleus of a person who thus satisfies

all the conditions.

Sexual violence is included in the Free Movement Directive as a measure that prevents gender violence that links the imbalance of power with immigration thus creating for a family member the rights of residence to the partner, spouse.

The Directive for former family members benefits domestic violence where the migrant of the Union who has committed abuse against another person in the host state exercises rights that are provided by the treaties at the time of divorce.

Thus, the family members are active, sufficient to retain the right to remain in the host state independently of the aggressor. A citizen of the Union and his family members can remain in another state until the citizen of the Union exercises the rights provided by the law of the Union.

A separated couple without a final divorce decree is benefited from the rules of the Union for free movement in case of non-Union citizen/s. The moment a citizen of the Union ceases to exercise his rights that come from the law of the Union and the host state once he leaves the host state their family members lose the right to residence (Jacques, 2015).

The Union law is valid for the status of citizen of the Union where domestic violence affects foreign citizens who come from a third country thus also facing a double victimization that in practice is real.

According to Art. 13, par. 2 third-country nationals maintain the right of residence for divorce. If a citizen of the Union leaves the country before the divorce procedure is concluded, Art. 14 of Directive 2004/83, the non-Union partner, spouse is deprived of the residence permit, i.e. the violent spouse, partner who risks criminal proceedings due to negative behavior towards a woman, children with probable manner, can be removed.

The same article 13, par. 2, letter c) concerns and generates a right of residence with autonomous manner for a non-Union citizen who is a victim of violence.

In this case, the CJEU takes a position regarding the rights derived for a citizen of a third country in cases where events independent of one's will cease and the spouse has abandoned the state of residence within the Union.

The right to autonomous residence is a consequence of domestic violence for purposes that determines the victim to maintain and/or lose the duty/right to remain in a Member State of the Union.

Within this framework, the CJEU has followed some restrictive interpretative paths such as for example in the *Secretary of State for the Home Department v. NA* case where the provision has deprived the protective capacity (Oosterom-Staples, 2017; *Gyeney, 2018*)<sup>32</sup>. In this case, the NA victim could not invoke

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<sup>32</sup>ECtHR, sentence of 30 June 2016, case C-115/15, Secretary of State for the

art. 13, par. 2, lett. c) since the divorce did not maintain the right of residence of a derivative nature and the rights suddenly consumed. Presumably, such rights have originated from the violent husband who is in the territory of the United Kingdom.

The CJEU, in 30 June 2016, stated that:

“(...) Art. 13, par. 2, lett. (a) and (c) of Directive 2004/38/EC must be interpreted as meaning that a third-country national, divorced from an EU citizen, by whom he or she has suffered acts of domestic violence during the marriage, cannot benefit from the maintenance of the right of residence where the commencement of the divorce proceedings is subsequent to the departure of the EU citizen spouse from that Member State (...).”

In the same line of thought, is the Singh case (Strumia, 2016)<sup>33</sup>,

which the CJEU confirmed that:

“(...) divorce proceedings are initiated after the departure from the host state of the EU citizen, the non-EU family member has no derived right to retain in that state (...) the departure of the EU spouse has already entailed the loss of the right of residence of the non-EU spouse residing in the host Member State. A subsequent divorce application cannot determine the restoration of this right, since in Art. 13 of Directive 2004/38 it appears exclusively the maintenance of an existing right of residence (...) interpretation of art. 13, par. 2, letter (a) and (c) of Directive 2004/38, pursuant to which a non-EU citizen could legitimately avail himself of the right deriving from that provision if the EU spouse had resided in the host Member State not until the date of commencement of the divorce proceedings, but until the date on which the acts of domestic violence were committed, is contrary to the literal, systematic and teleological interpretation of Article 13, paragraph 2, of Directive 2004/38 (...) a non-EU citizen has been the victim during the marriage of acts of domestic violence committed by an EU citizen from whom he is divorced, the latter must reside in the host Member State, in accordance with Article 7, paragraph 1, of Directive 2004/38, until the date of commencement of the divorce proceedings, in order for the non-EU citizen to be legitimately able to avail himself of Article 13 of that Directive (...).”

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Home Department v. NA, ECLI:EU:C:2016:487, published in the electronic reports of the cases.

33CJEU, sentence of 16 July 2015, case C-218/14, Singh and others, ECLI:EU:C:2015:476, published in the electronic reports of the cases. par. 67.

In this sense, the Advocate General Wathelet made a distinction between ordinary hypotheses and those which are referred to free movement and which are part of the Diatta and Singh cases, such as cases of domestic violence for victims, who are afraid of a prosecution of violence in the initiation of a divorce procedure. The Advocate General was of the opinion that the perpetrators of the crime seek to impose criminal sanctions and they move away from the host state depriving the spouse of their residence rights. Domestic violence through the interpretation of art. 13, par. 2, lett. c) seems to be contrary with the objective it protects and which it has at its disposal<sup>34</sup>.

In this regard, the CJEU stressed that art. 13, par. 2, lett. c) offers legal guarantees for citizens, who come from outside the Union where the right of residence depends as a family bond for the guarantees that are necessary at the time of divorce and in the event of separation because the right of residence of the spouse, who is a citizen of a third country, is not thereby prejudiced.

Additionally, the CJEU highlights that the rights of protection in the event of divorce distance the violent spouse even before the couple legally ends their marriage and because the rights of

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<sup>34</sup>According to the Advocate General Wathelet, par. 76: “(...) the fact of being the victim of an act of domestic violence has been considered, by the Union legislature, a reason justifying the transformation of a derived right into an individual right, the recognition of such a right cannot be made subject solely to the will of the perpetrator to remain in the territory of the host Member State (...”).

people who come from outside the Union need greater protection. Thus protection is a binding and obligatory right for the law of the Union and for the Member States where the citizen of the Union is present in the host Member State as a self-employed worker, employee and where the spouse outside the Union must start the procedure for annulment, dissolution of a marital bond while also maintaining the right of residence for the foreign citizen who is economically active.

Pursuing Art. 13, par. 2, lett. c), the CJEU has interpreted, for the victim, the right to non-discrimination, the rights of human dignity as integration of the person that protects international law and the Charter of the Fundamental Rights of the Union.

Art. 28 of the Directive 2004/38 protects the removal after the application for an autonomous residence permit. Directive 2003/86/EC of the Council of 22 September 2003, relating to the right to family reunification, regulated the residence for the family members of third-country nationals and those legally residing in the Union. Art. 15, par. 3, thus establishes provisions on the Member States that guarantee the autonomous residence permit in difficult situations that require it.

Par. 3, lett. 5 of the Communication from the Commission to the European Parliament and the Council of 3 April 2014 on the guidelines for the application of Directive 2003/86, has taken into consideration difficult cases such as situations of cases of

domestic violence<sup>35</sup>.

The CJEU considers as discriminatory the related requirements that were favourable and foreseen in Directive 2003/86/EC and are declared as not comparable with situations that have excluded the treatment of Art. 20 CFREU (Strumia, 2022)<sup>36</sup>.

The application of Directive 2004/38/EC promotes the free movement of citizens of the Union, where according to the X. v. Ètat Belge case it has facilitated the integration for third-country nationals in the Member States and family life and family reunification is the result of the recital n. 4<sup>37</sup>.

Directive 2003/86/EC has allowed domestic legislation to require a minimum age for the sponsor and his/her spouse as well as to prevent forced marriages. These rights of victims are part of the European integration related to the free movement of persons and their families. Thus, the case of domestic violence as we have seen in the NA case has been moved to a secondary level since the CJEU has adopted a situation for victims favorable to the recognition, affirmation of their rights that are protected by other international instruments.

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<sup>35</sup>COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on guidance for application of Directive 2003/86/EC on the right to family reunification, COM/2014/0210 final: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0210>

<sup>36</sup>CJEU, sentence of 2 September 2021, case C-930/19, X v. Ètat belge, ECLI:EU:C:2021:657, published in the electronic reports of the cases.

<sup>37</sup>CJEU, sentence of 21 April 2016, case C-558/14, Khachab, ECLI:EU:C:2016:285, published in the electronic reports of the cases, par. 26.

The CJEU has also referred to the request for divorce in the X. v. État belge case of 2 September 2021<sup>38</sup>, as a theological interpretation and contrary to the previous judgment of NA, which established domestic violence and divorce as a starting point for the citizen of the Union without excluding the right of continuation of the permit that has provided according to the margins of uncertainty and divorce procedure to start a reasonable term after the final departure.

Domestic violence as part of the Directive 2004/83 seems a failure for the guarantee of the relevant regulation that has to do with free movement and that has not transformed the abuse for vulnerable migrants to third countries and especially of women who are weaker and more susceptible to domestic abuse.

The provision is not integrated with the establishment connected with the market of services and related labor. The market situation thus offers a solution that is based on fundamental rights and the treaties of the Union that have contributed to

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38CJEU, sentence of 2 September 2021, case C-930/19, X v. État belge, *op. cit.*, par. 43: “(...) contrary to what is stated in paragraph 51 of the judgment of 30 June 2016, NA (C-115/15, EU:C:2016:487), it must be considered that, for the purposes of maintaining the right of residence on the basis of Article 13(2), first subparagraph, point (c) of Directive 2004/38, divorce proceedings may be initiated after the Union citizen’s departure from the host Member State. However, in order to ensure legal certainty, a third-country national who has been the victim of acts of domestic violence committed by his or her Union citizen spouse and whose divorce proceedings were initiated before the latter’s departure from the host Member State may invoke the maintenance of his or her right of residence under that provision only to the extent that those proceedings are initiated within a reasonable period after that departure (...)”.

overcoming the content of the CFREU (Kellerbauer, Klamert, Tomkin, 2019) requiring an interpretation for the protection of fundamental rights within the logic of the Union (Favreau, 2010).

### **Protection under the Istanbul Convention of migrant women who suffer domestic violence**

The European Union on 1st June 2023 concluded the Convention of the Istanbul after a constant commitment of the European parliament<sup>39</sup> to follow the accession process of the Convention (Verellen, 2021; Kübek, 2022)<sup>40</sup>.

The related objectives of the Istanbul Convention are the protection of women from all forms of violence as well as the elimination of discrimination for protection, equality thus reaching a framework where the obligations include policies,

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<sup>39</sup>European Parliament resolution of 15 February 2023 on the proposal for a Council decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence (COM(2016)0109-2016/0062R(NLE)), OJ C 283, 11.8.2023, p. 149–162: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023IP0047>

<sup>40</sup>Council Decision (EU) 2023/1075 of 1 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to institutions and public administration of the Union.

ST/5514/2023/INIT. OJ L 143I, 02/06/2023, p. 1-3: <https://eur-lex.europa.eu/eli/dec/2023/1075>; Council Decision (EU) 2023/1076 of 1 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement. ST/5523/2023/REV/1. OJ L 143I, 02/06/2023, p. 4–6: <https://eur-lex.europa.eu/eli/dec/2023/1076>. See also the Opinion 1/19 of the CJEU of 6 October 2021, ECLI:EU:C:2021:198, published in the electronic reports of the cases.

prevention and protection measures based on the application of criminal law against violence suffered by women.

The adoption of policies and programs are contrasted with gender inequality. The prevention of violence through education, training, awareness raising, protection, support of victims and measures seek the path of criminalization as well as the issuance of greater protection.

Art. 4 par. 2 of the Convention stated that:

“(...) discrimination is based on sex, gender, race, colour, language, religion, political or other opinion, national or social origin, membership of a national minority, wealth, birth, sexual orientation, gender identity, age, health, disability, marital status, migrant or refugee status or any other status (...).”

These are obligations that the group of experts combating violence against women and domestic violence (GREVIO) respects and monitors.

Art. 66 of the Convention goes through a procedure that signals the relevant investigation on domestic violence. The framework of the Union relating to domestic violence and the Istanbul Convention within certain terms concern the free movement of persons considering and formulating what the Convention itself establishes with objectives that eliminate discrimination and advance equality rights.

The Istanbul Convention provides direct rules for migrant women. Art. 59, par. 1 guarantees that the victims, the status of residence depends on the spouse, the partner who obtains after request the dissolution of the marriage and in difficult situations

and autonomously the stay despite the duration of the marriage and relationships. Thus, in a reasonable way migrants victims of violence are protected by the law of the Union and the immigration law of the Member State where the migrant victim has suffered violence.

Difficult cases connected with violence and the experience for the dissolution of the marriage result in the loss of refugee status when the violence occurs in a terminating way. This interpretation is connected with women outside the Union as in the NA case that have lost their rights of residence and mature the right to an autonomous migrant status according to art. 59, par. 1 which applies to every norm of the Union where the dependent status of the woman is regulated as part of the Convention of Istanbul which is regulated together with the national legislation on immigration (Heusel, 2024).

The issuing and duration of the autonomous residence permit is established according to domestic law and follows the objectives of the Convention which grants a period of time that thus confers the right to benefit from the relevant social benefits, health care, education and the labor market.

Art. 59, par. 2 of the Convention asks victims of violence to suspend an expulsion procedure against the partner on which the residence permit for the woman depended and where in an autonomous manner the residence permit to leave a violent

partner is applied.

Respect for the law of the Union is a principle that allows the residence permit. The woman does not wait to be a victim and to suffer injuries to ask for protection. Application for protection in migrant women emerge from cases of domestic violence and in case their request for residence is still in an investigation phase. The residence permit is independent of the duration of a marriage and of any type of relationship through “a couple”.

In this spirit, the Convention also refers to repatriation and the loss of the status of the person who is resident as a tool used by the perpetrators of a crime that prevents victims from being helped and from separating from their partner and spouse. The Member States of the Council of Europe have asked partners and spouses to remain in a relationship status for a certain period of time 1-3 years until the spouse, partner acquires the status of an autonomous resident<sup>41</sup>.

Art. 59 of the Istanbul Convention and the Directive 2003/86/EC<sup>42</sup> have laid the foundations for the adoption of

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<sup>41</sup>Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Council of Europe Treaty Series - No. 210, par. 301: “(...) deportation or loss of residence status is a very powerful tool used by perpetrators to prevent victims of violence against women and domestic violence from seeking help from authorities or from separating from the perpetrator (...) Council of Europe member states require spouses or partners to remain married or in a relationship for a period ranging from one to three years for the spouse or partner to be granted an autonomous residence status. As a result, many victims whose residence status is dependant on that of the perpetrator stay in relationships where they are forced to endure situations of abuse and violence for long periods of time (...”).

<sup>42</sup>Council Directive 2003/86/EC of 22 September 2003 on the right to family

measures for victims of another country since the solution of marriage leaves the way open for the loss of residence status in the country where they habitually live and that they can acquire their own status.

The ratification of the Istanbul Convention and the EU have thus adopted all the measures, required for the residence of migrant women that are victims of violence.

They also setting gradually the limits for the rule on domestic violence that applies to citizen spouses who are outside of the Union and who have obtained the relative divorce. The migrant of the Union was also present and has exercised the rights that were provided for by the treaties in the host state and that deprived of the useful effect also allowing the violent spouse of the union to demonstrate in time his own power.

### **The “Femmes victimes de violences domestiques” case**

The case law has played an important role in the protection of women's rights and violence. It takes into consideration, the Intervyuirasht organ na DAB pri MS case of 16 January 2024 (Femmes victimes de violences domestiques) (Steininger, 2024; Kübek, Bornemann, 2024; Peers, 2024)<sup>43</sup>, where women have reunification. OJ L 251, 3.10.2003, p. 12-18.

43CJEU, sentence of 16 January 2024, case C-621/21, Intervyuirasht organ na DAB pri MS (Femmes victimes de violences domestiques), ECLI:EU:C:2024:47, published in the electronic reports of the cases. See also the Committee of CEDAW in General recommendation No. 28 on the core obligations of states parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women which is affirmed that: “(...) term “sex” here refers to biological differences

not been afraid as victims of domestic violence in the country of origin to be benefited by international protection within the Union. Thus, women receive protection to a certain social group where persecution awaits and it is committed and the actors and acts according to the CJEU pay attention to omissions that evaluate the conditions for the recognition of refugee status (Legrand, Nicolosi, 2024).

The judgment has as its interpretative basis a migration policy that characterizes the development that builds a legal basis around the ECHR and represents a common law for the international protection of human rights.

The migration policy with an exclusive and strategic way respects the economic relations with the countries that are bordering the Union and that are in the immediate vicinity as long as they are visible and occur outside the territory of the Union the violations of human rights.

Proof of this is the signing of the Declaration of the EU and Turkey on 18 March 2016 for the EU-Tunisia Memorandum of 16 July 2023 and the Partnership Agreement through the EU and Egypt on 17 March 2024.

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between men and women. The term “gender” refers to socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community (...”).

A new pact of the Union on migration and asylum is strengthened on 14 May 2024, as an exceptional case for the procedures of detention, expulsion and externalization for international protection that become rules of the CJEU and defend the rights of migrant women as in the case of 16 March 2024. In an interpretative way, the fundamental rights that are inserted in a legislative scheme are implemented within the common market favoring thus the CJEU regarding the international protection of domestic violence.

The CJEU in the “Femmes victimes de violences domestiques” case stated that:

“(...) women who suffer domestic violence in their country of origin in particular, qualify as a protected “social group” under EU Directive 2011/95/EU and can therefore avail themselves of refugee status or subsidiary protection in the Common European Asylum System (...”).

This is a case where the Sofia Administrative Court was asked for the opinion of the Advocate General de la Tour. By decision on 16 January 2024 they were entrusted international women’s rights instruments such as CEDAW, the Istanbul Convention and the United Nations High Commissioner for Refugees (UNHCR).

The asylum system, as part of migration policy and with aspects that were linked with Directive 2011/95/EC and recital no. 30, affirmed that:

“(...) it is necessary to introduce a common definition of the reason for persecution constituted by membership of a particular social group (...) certain social group, due account must be taken of aspects related to the sex of the applicant, including gender identity and sexual orientation, which may be linked to certain legal traditions and customs, involving for example genital mutilation, forced sterilization or forced abortion, insofar as they are related to the applicant's well-founded fear of persecution (...) gender identity, genital mutilation and reproductive violence are presented mainly in relation to their public function as part of the traditions and customs that exist in a community whereas in the case examined (...) it is discussed whether gender-based persecution in the private sphere is a reason for international protection (...)”<sup>44</sup>.

The preliminary reference concerning the woman WS who was a Turkish citizen belonging to an ethnic group of Kurds, Sunni Muslim and divorced entered in a violent manner in Bulgaria before being transferred to Germany where she requested international protection on the grounds that her ex-husband's family could kill her if she were to return to Turkey. The request was not accepted in 2020 by the DAB, i.e. the Bulgarian State Agency for Refugees as the authorities supported by domestic violence did not consider protection.

In 2021, the WS submitted a new application, this time based on:

“(...) well-founded fears of persecution by non-state actors due to her membership of a “certain social group”, namely that of women victims of domestic violence as well as women who may be victims of “honour crimes” (...) she claimed that the Turkish state was not able to defend her against such non-state actors and argued that her return to Turkey would expose her

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<sup>44</sup>Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). OJ L 337, 20.12.2011, p. 9–26: <https://eur-lex.europa.eu/eli/dir/2011/95/oi>

to an “honour crime” or forced marriage and, consequently, to a violation of Articles 2 and 3 ECHR (...)<sup>45</sup>.

From what we understand, the referring judge tried to investigate precisely and to take into account the establishment of a woman victim of domestic violence who belongs to a certain social group according to Art. 10, par. 1, letter d) of the Qualifications Directive. Thus, the judge relied on an interpretation of the Qualifications Directive and took into account Art. 30 and the Istanbul Convention. Physical violence, sexual violence, forced marriages, harassment and violence against women that are gender-based are topics analyzed and included in the Istanbul Convention. Continuing with the recital n. 30 of the Qualifications Directive that referred to in par. 31 of the sentence, “acts of persecution” are included according to Art. 9, par. 2 of the same Directive.

The referring judge asked the CJEU the types of application of the notion of violence against women that are gender-based and as provided for by the Istanbul Convention and the general notion of the scope of the law of the Union.

The national judge insisted on the notion that includes the specific social group as a reason for granting international protection, as a sufficient element for the female biological sex, the victim of domestic violence and the related criteria of distinction. It is specified and affirmed that the causal link

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<sup>45</sup>CJEU, sentence of 16 January 2024, case C-621/21, Intervyuirasht organ na DAB pri MS (Femmes victimes de violences domestiques), op. cit., par. 25.

between the reasons for persecution and the lack of protection that it grants in the country of origin in the case of violence that is committed by a non-state subject according to question no. 4 are imposed by the referring judge.

This question has to do with the conditions for granting subsidiary protection and the denial of refugee status towards the WS. The CJEU relied on the measure of gender violence that comes from the Istanbul Convention and not only finding application to conditions that are related to refugee status and on what the Qualification Directive establishes. The Directive for the CJEU is interpreted as a qualification of the Istanbul Convention and as a relevant treaty according to Art. 78, par. 1 TFEU where the policy of the Union should be compliant.

Thus, the identification that in an abstract way has encountered the obstacle of a mixed agreement was ratified by the Union and not by all Member States and especially by Bulgaria that is not a member of the Istanbul Convention, since it is in conflict with the Bulgarian constitution (Vassileva, 2018).

The CJEU relied on opinion no. 1/19 of the accession of the Union to the Istanbul Convention regarding guaranteed national identity, Art. 4, par. 2 TEU, against Bulgaria thus implementing measures contrary to the domestic constitution.

The sentence of 16 January 2016 applied the Istanbul Convention stating that:

“(...) Article 10, paragraph 1, letter d), of the Qualification Directive must be interpreted as meaning that, on the basis of the conditions existing in the country of origin, both women from that country as a whole and smaller groups of women who share an additional common characteristic (...) can be considered as belonging to “a particular social group” as a ground for recognising refugee status (...)”<sup>46</sup>.

The CJEU supported and approached the Istanbul Convention seeking to produce legal effects for the legal system of the Union but also for the national legal systems of the Member States that have ratified the Convention and are committed to its content.

#### **A modus interpretandi of the “relevant treaties”**

The Directive 2011/95 in the context of international law and the related conventions on women’s rights have been interpreted by the CJEU in a systematic modus according to the purposes of the Directive that respected the Geneva Convention, Art. 78, par. 1 TFEU. This is also what is part of recital no. 17 of the Directive, that is, (par. 337) discriminations for the treatment of persons who fall within the scope of application of the same Directive<sup>47</sup> and are prohibited.

In parallel, the Geneva Convention of 1951 and the Protocol of 1967 explicitly took into account Directive 2011/95. The CJEU interpreted the CEDAW of 1979 and also the Istanbul

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<sup>46</sup>CJEU, sentence of 16 January 2024, case C-621/21, Intervyuirasht organ na DAB pri MS (Femmes victimes de violences domestiques), op. cit., par. 62

<sup>47</sup>CJEU, sentence of 16 January 2024, case C-621/21, Intervyuirasht organ na DAB pri MS (Femmes victimes de violences domestiques), op. cit., par. 37.

Convention of 2011. However, the EU is not a party to CEDAW and not all the EU Member States have ratified the relevant treaties.

The relevant Committee on the Elimination of Discrimination against Women tries to monitor the implementation of CEDAW by pointing out that the Convention has completed an international status where legal protection is applied to women in the general context of refugees.

Recital No. 17 affirmed the binding nature of Member States. In fact, they bind the obligations that are provided for instruments that are relevant to international law as parties that prohibit discrimination of CEDAW.

The Istanbul Convention binds after the accession of 1st October 2023 the obligations that are part of the application of Art. 78, par. 2 TFEU (Blanke, Mangiamelli, 2021), by conferring on the legislator of the Union the relevant competence to adopt measures that are related to a European system that is part of the common asylum policy.

The Convention thus presents a connection with asylum and non-refoulement according to Art. 78, par. 1 TFEU (Blanke, Mangiamelli, 2021). The development in the WS case is important for international treaties of a relevant nature that respects the policy that interprets the validity of the provisions of a secondary law.

Directive 2011/95 in Art. 9 states that the qualification of persecution is sufficient to represent the violation of fundamental human rights as a sum of measures concerning violations of human rights that affect an individual in a similar way.

The article also takes into account examples of persecution related to acts of physical, psychological violence including sexual violence as well as specific acts that are directed against one sex.

The Directive thus interprets situations of domestic violence where it qualifies domestic violence as an act of persecution and in conditions where women have the right to international protection.

We speak of cumulative conditions that are provided for by Art. 10, par. 1, letter d) of Directive 2011/95<sup>48</sup> and belonging to a social group who shares some identifying aspects that outline historical commonalities that change:

“(...) faith that is so fundamental to identity or conscience that a person should not be forced to renounce it (...) possessing “a distinct identity” in the country of origin “because he or she is perceived as different from the surrounding society (...) guidelines no. 2 “Membership of a particular social group” (2002) of UNHCR<sup>49</sup> (...) women, as a whole, may be considered as

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<sup>48</sup>Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). OJ L 337, 20.12.2011, p. 9–26.

<sup>49</sup>UNHCR, Guidelines on International Protection No. 2 “Membership of a Particular Social Group” (2002), pursuant to Art. 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees:

belonging to a “particular social group”, within the meaning of Article 10, paragraph 1, letter d), of Directive 2011/95, where it is established that, in their country of origin, they are, because of their sex, exposed to physical or mental violence, including sexual violence and domestic violence (...) women who refuse a forced marriage, when such a practice may be considered a social norm within their society, or transgress such a norm by terminating such a marriage, may be considered as belonging to a social group with a distinct identity in their country of origin, if, because of such behaviour, they are stigmatised and exposed to the disapproval of the surrounding society which leads to their social exclusion or to acts of violence (...) (paras. 57-58)”<sup>50</sup>.

The interpretation of the ECtHR is offered by the inertia of state authorities in relation to domestic violence where an applicant, who is afraid of being persecuted in the country of origin by non-state subjects it is not necessary to establish the reasons for persecution provided for by the relevant Directive 2011/95 and the acts of persecution<sup>51</sup>.

This is an interpretation, which according to par. 21 of the UNHCR, guidelines the international protection. N. 1<sup>52</sup> affirms the:

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<https://www.unhcr.org/media/guidelines-international-protection-no-2-membership-particular-social-group-within-context>

50See also Art. 10, par. 1 of the Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council. PE/70/2023/REV/1. OJ L, 2024/1347, 22.5.2024.

51ECtHR, *Opuz v. Turkey*, op. cit., parr. 147-149.

52UNHCR, Guidelines on International Protection No. 1 “Gender-Related Persecution” in the Context of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01: <https://www.unhcr.org/media/guidelines-international-protection-no-1-gender-related-persecution-within-context-article-1a>

“(...) risk of being persecuted by a non-state actor (for example husband, partner or other non-state actors) for reasons related to one of the offences contained in the (Geneva) Convention, the causal link exists, whether the absence of protection by the state connected to the (Geneva) Convention or not (...) the causal link also exists when the risk of being persecuted by a non-state actor is not connected to one of the offences provided for by the (Geneva) Convention, but the inability or unwillingness of the state to offer protection derives from one of them (...) effectively protected victims, gender-based violence, such as in the case of honour crimes, committed by non-state actors, falls within the scope of the offence of torture in line with the ECHR (...)”<sup>53</sup>.

The Istanbul Convention is a relevant treaty under Art. 78, par. 1 TFEU. It brings measures for asylum policy into line with the Convention. In this spirit the CJEU has interpreted in par. 44:

“(...) Article 10, paragraph 1, letter d) of the latter, in compliance with the Istanbul Convention (...) mobilised, in essence, the doctrine of interpretation in conformity with international law, which ensures the primacy of international agreements over provisions of domestic secondary law (...) the European institutions are bound by the agreements concluded by the EU under Article 216, par. 2, TFEU, “and consequently, such agreements prevail over acts of secondary [European] law” (judgment of the Court of 3 June 2008, case C-308/06, Intertanko, paragraph 42) (...) the Union is required to exercise its competences in compliance with international law, this implies the duty to interpret secondary law “in the light of the relevant [international] rules” (judgment of the Court of 24 November 1992, case C-286/90, Poulsen, paragraph 9) (...) the EU is required to respect the international agreements binding it under Article 216, paragraph 2, TFEU. From this premise arises the obligation for the Court to refer to the provisions of the international convention when it interprets or applies the relevant internal rules. From this perspective, the duty of interpretation in conformity represents a corollary of the incorporation of international law into EU law (...).”

Also in this case the interpretation in accordance with the provisions of secondary law of the Union are admissible and privilege the international agreement as a provision that conflicts with international law since it is a *contra legem*

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53 ECtHR, sentence of 20 July 2010, case n. 23505/09, N. v. Sweden.

interpretation (Lenaerts, Gutierrez-Fons, 2020).

The WS case based its interpretation on the previous Poulsen case and on Art. 2166, par. 2 TFEU.

It has mentioned the prevalence of international agreements, which consist of provisions of secondary law thus obliging this type of interpretation, according to Art. 78, par. 1 TFEU. This is a provision of primary law that imposes asylum policy on secondary law:

“(...) in compliance with the Geneva Convention and other relevant treaties referred to in Article 78, paragraph 1, TFEU (...) the Istanbul Convention is relevant (...)” (Coutts, 2017; Progin-Theuerkauf, 2018)<sup>54</sup>.

The conformity of Art. 78, par. 1 TFEU is based on a precise obligation of interpretation that applies to secondary refugee law, which respects the relevant international law instruments as an obligation that conflicts with gender violence that is provided for by the Istanbul Convention and that is based on secondary asylum law.

This conforming interpretation represents a method followed by the CJEU to facilitate the recognition of refugee status for women victims of violence. Such an obligation recognizes gender violence as a form of persecution and obligation where the interpretation for gender violence as a form of persecution and the obligation of a sensitive basis applied to grounds for

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<sup>54</sup>CJEU, sentence of the 31 January 2017, case C-573/14, Lounani, ECLI:EU:C:2017:71, published in the electronic reports of the cases, par. 42. Sentence of the 14 May 2019, joined cases C-391/16, C-77/17 and C-78/17, M. (Revocation of refugee status), ECLI:EU:C:2019:403, published in the electronic reports of the cases, par. 75 and 47.

persecution that respects Art. 60, par. 1 and 2 of the Istanbul Convention and Art. 10, par. 1, letter d) of the Qualification Directive where the notion of a particular social group is a reason for granting international protection. In par. 57 the CJEU states that:

“(...) taken together, they may be considered as belonging to a particular social group within the meaning of Article 10, paragraph 1, letter d) of the Directive [qualifications], if it is established that in the country of origin, they are, because of their sex, exposed to physical or mental violence, including sexual and domestic violence (...).”

Domestic violence thus qualifies the act of persecution that allows and offers to women victims of violence international protection according to the rules of the Union (Chollet, 2024). The hypotheses of structural discriminations that are based on gender include women who are not conformed and who oppose gender oppression.

This is an approach that includes the political opinions that define the social group where the CJEU in the Staatssecretaris van Justitie en Veiligheid (Femmes “s’identifiant à la valeur de l’égalité entre les sexes” case, women committed to gender equality prosecute members of a particular group<sup>55</sup>.

The applications for international protection in the K. and L. case were decided in an autonomous way. The judge of the court relied on:

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55CJEU, see the conclusions of the Advocate General Anthony Michael Collins presented in 13 July 2023 in case: C-646/21, K, L v. Staatssecretaris van Justitie en Veiligheid, ECLI:EU:C:2023:581, published in the electronic reports of the cases.

“(… ) Western norms, values and concrete behaviors” that can or cannot establish a particular social group (...).”

The compliant interpretation of the Istanbul Convention has standardized and protected vulnerable women as a result of a failure to accede other Member States such as Poland and Bulgaria to it.

The compliant interpretation has allowed and incorporated Art. 60 of the Istanbul Convention into the law of the Union. This evolution, puts the WS case as a base for further development of the European law relevant for women who are in the flight stage as in the case of Afghanistan and are recognized as refugees opening thus the way for new cases in the CJEU.

### **Conclusions**

The new key to the protection of women who suffer domestic violence or not according to the spirit of jurisprudence is that these women are part of a social group that offers continuous commitment to gender equality, a fundamental instrument to their identity as well as by the treaties of the Union that reflect the high standards that call for international protection of human rights starting from the Istanbul Convention.

The pact of the EU on migration adopted on 14 May 2024 and the Istanbul Convention have expanded protection for victims, gender violence. Procedures and external borders hinder asylum applications and victims of gender violence assess their requests

individually.

The regulations are narrow and the extensive interpretation of the CJEU has made progress towards a European level protection of women victims of domestic violence that guarantees the application of an interpretation for gender violence in all countries of the Union.

Art. 33 of the Directive 2024/1385 on combating violence against women who come from non-European countries benefit from specific assistance which is not sufficient to guarantee victims of domestic violence. Art. 59 of the Istanbul Convention is

“relevant in recital 4 of the Directive 2024/1385 to the same Convention, falls within the interpretative logic of the “relevant treaties (...)” (Kasim, 2024).

This Directive deals with topics such as the rejection, asylum and the right of residence which is in accordance with the Convention. Therefore, the Directive does not allow the implementation of some standards that come from domestic legislation and above all because in this way it guarantees a spirit of cohesion that respects the protection of migrant women at European and international level.

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